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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CALVIN BRUCE,

Defendant and Appellant.

D041913

(Super. Ct. No. SCD169283)

APPEAL from a judgment of the Superior Court of San Diego County, William H. Kennedy, Judge. Affirmed.

Calvin Bruce appeals from a judgment convicting him of robbery and evading an officer with reckless driving. He argues the evidence was insufficient to support a reckless evasion conviction based on an aiding and abetting theory. Additionally, he asserts he should not have been punished for both robbery and evasion because the two offenses constituted an indivisible course of conduct. We reject these arguments.

Bruce also contends the trial court erroneously imposed double punishment for a firearm discharge enhancement when it used the enhancement to calculate the minimum indeterminate life term for robbery under the Three Strikes statute (Pen. Code,¹ § 667, subd. (e)(2)(A)(iii)), and then again to impose a separate 20-year determinate term under the gun discharge enhancement statute (§ 12022.53, subd. (c)). We hold that based on our Supreme Court's holding and analysis in *People v. Dotson* (1997) 16 Cal.4th 547, the sentence was correct.

FACTS

At about 2:00 p.m. on August 13, 2002, Bruce and Karen Young were observed leaving a Fry's Electronics store through an emergency exit. Young was pushing a shopping cart filled with Fry's merchandise that had not been paid for. The emergency alarm went off, and three employees pursued Bruce and Young into the parking lot. When one of the employees called out "[h]ey fool," Bruce pulled out a gun and fired it once in the direction of the employees.

Bruce flagged down a Chevrolet Caprice vehicle. The Caprice stopped, and Bruce unloaded the merchandise into the back seat and entered the vehicle. As the Caprice was leaving the area, police vehicles arrived and commenced a pursuit with lights and sirens on. Traveling south on Interstate 15 during moderate to heavy traffic, the Caprice reached speeds of over 90 miles per hour and weaved in and out of all four traffic lanes in an unsafe manner.

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

Bruce was sitting in the right rear passenger seat of the Caprice. As the Caprice was traveling on Interstate 15, the officer in the lead police vehicle saw Bruce point to the Adams Avenue exit. The Caprice then swerved to the right lane and the shoulder of the road as if to exit the freeway, but then swerved back into the traffic. The Caprice continued south, still weaving in and out of traffic, and made an abrupt move to the right to exit Interstate 15 at El Cajon Boulevard. The Caprice exited at about 55 miles per hour and almost hit a police vehicle positioned at the top of the exit ramp. The Caprice turned on El Cajon Boulevard at about 40 miles per hour and almost crashed with the police cars that were monitoring the pursuit in that area. On El Cajon Boulevard, the Caprice traveled at speeds up to 60 miles per hour in a 35-mile-per-hour zone, weaved in and out of three traffic lanes in a hazardous manner, and ran a red light. When the Caprice turned on 35th Street, an officer considered terminating the pursuit because of an elementary school located there, but decided not to because of the violence at the Fry's store.

When the Caprice was on 35th Street, the officer in the lead saw Bruce motion to the right, and the car then turned right on Polk Street. The Caprice traveled about 40 miles per hour, going the wrong way, on narrow, one-way Polk Street, causing a car to pull into an alley to avoid a collision. The Caprice was being pursued by about 10 police vehicles, and it wound through streets in the neighborhood at 50 to 60 miles per hour. The Caprice almost struck pedestrians crossing a street, almost hit a car at an intersection, forced a car off the road at a blind curve, ran a stop sign, and finally collided with a moving car and was disabled.

When the Caprice crashed to a stop, Bruce exited the car and started running. The police called out to him to stop, but Bruce continued to run away, going between buildings and into a parking lot. Before he was caught by an officer, Bruce threw his gun onto a patio.

During the vehicular pursuit, the officer in the lead police vehicle used Bruce's two observed hand signals to relay information to other officers about the anticipated movements of the Caprice.

DISCUSSION

Substantial Evidence of Aiding and Abetting Reckless Evasion

Challenging his reckless evasion conviction, Bruce argues the evidence is insufficient to support a finding that he aided and abetted the crime. He contends the only evidence establishing his aider and abettor status was the hand gestures he made during the vehicular pursuit, which he characterizes as too ambiguous to support anything more than a speculative inference of his guilt.

The crime of evading a police officer while driving recklessly is committed when a person flees or attempts to elude a police officer while driving a pursued vehicle with a willful or wanton disregard for the safety of persons or property. (Veh. Code, § 2800.2; *People v. Sewell* (2000) 80 Cal.App.4th 690, 695.) "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Hill* (1998) 17 Cal.4th 800, 851.) Whether a

defendant's conduct constitutes aiding and abetting is determined by evaluating whether the person directly or indirectly aided the perpetrator by acts or encouraged him or her by words or gestures. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 411.) Although presence at the scene of the crime is not alone enough to establish aider and abettor status, it is a factor that may be considered, along with companionship with the perpetrator and conduct before and after the crime. (*Id.* at p. 409.)

When reviewing a challenge to the sufficiency of the evidence, we consider the entire record and draw all reasonable inferences in favor of the judgment to determine whether a rational trier of fact could find guilt beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.)

Here, there is ample evidence to support the jury's finding that Bruce aided and abetted the crime of evasion. Even if the officers had seen no hand gestures by Bruce, the jury could reasonably infer that his conduct before and after the evasion established beyond a reasonable doubt that he encouraged the driver to drive in a reckless manner to try to escape the police. Bruce's conduct of shooting a gun in the direction of the store employees unequivocally showed that he was willing to take drastic measures to try to escape. Further, when the Caprice was disabled, he did not surrender but instead continued to try to escape on foot. From this conduct, the jury could infer that he was intent on escaping and thus he encouraged the driver to drive in whatever manner was necessary to elude the police regardless of the danger. The officer's observations of his hand movements, which appeared to be giving the driver directions, further buttress the reasonableness of the jury's aider and abettor finding.

Punishment for Both Robbery and Reckless Evasion

The trial court imposed a 25-year-to-life term for reckless evasion, to run consecutive to a 35-year-to-life term for robbery. Bruce argues that sentence on the evasion offense should have been stayed under section 654 because his crimes of robbery and evasion involved an indivisible course of conduct.

Section 654 prohibits multiple punishment for a single act or indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) When a defendant is convicted of two offenses that are part of an indivisible course of conduct, the sentence for one of the offenses must be stayed. (*Id.* at pp. 591-592.) Whether a course of criminal conduct is divisible so as to allow multiple punishment depends on whether the defendant had a separate intent and objective for each offense. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all the offenses were incident to one objective, the defendant may only be punished for one offense. (*Ibid.*) For example, if one offense is merely the means of perpetrating another offense and incidental to the primary objective of the main offense, punishment for both offenses is not permissible. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 20.) In contrast, if the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

The courts have recognized that a second offense committed to achieve a first offense may "at some point . . . become so extreme [that the second offense] can no

longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.) Similarly, the courts have considered that when there is a temporal or spatial separation between offenses, giving the defendant time to reflect, the defendant's decision to continue a course of criminal conduct that creates a new risk of harm can support a finding that the defendant entertained separate criminal objectives. (See *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1257; *People v. Green* (1996) 50 Cal.App.4th 1076, 1085; *People v. McGuire* (1993) 14 Cal.App.4th 687, 699; see also *People v. Latimer, supra*, 5 Cal.4th at pp. 1211-1212, 1216.)

A trial court has broad latitude in determining the factual issue of whether a defendant has multiple objectives, and on appeal we apply the substantial evidence test to review the court's finding. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Here, the facts show egregious escape conduct, separated from the robbery by both time and location. That is, the evasion did not occur simultaneously with the seizure of the goods, but rather occurred after the goods had been placed in the car and at locations distant from the store site. Further, the vehicular escape put numerous persons at peril and created a danger entirely distinct from the robbery. These circumstances reasonably support an inference that the evasion conduct evinced a criminal objective independent of the robbery. The trial court could reasonably infer that Bruce intended to use force to steal the merchandise, and then, once the police were summoned, also decided to use extreme measures to evade the police by encouraging his cohort's reckless driving.

We are not persuaded by Bruce's argument that because escape is considered part of a robbery for purposes of applying the felony murder rule and determining aider and abettor status, the escape cannot be divisible from the robbery for purposes of multiple punishment. The courts have held that whether a robbery is technically complete or incomplete at the time a second offense is committed is not determinative on the issue of multiple punishment for an indivisible course of conduct. (See *People v. Bauer* (1969) 1 Cal.3d 368, 377; *People v. Nguyen, supra*, 204 Cal.App.3d at p. 193.) The appropriate inquiry is whether the defendant had multiple objectives, with a view to effectuating section 654's purpose of ensuring punishment is commensurate with culpability. (See *People v. Neal, supra*, 55 Cal.2d at p. 20; *People v. Nguyen, supra*, 204 Cal.App.3d at pp. 191, 193.) Here, the trial court's finding of multiple objectives is supported by the fact that the evasion was divisible from the robbery both as to time and location and involved extreme conduct that created a new risk of harm. There can be no doubt that the dangerous vehicular escape heightened Bruce's culpability far beyond the robbery.

Given our holding that there is substantial evidence to support a finding that Bruce entertained multiple criminal objectives, we need not address the parties' dispute over whether the multiple victim exception applies to the crime of reckless vehicular evasion.

Section 12022.53 Enhancement

Bruce was convicted as follows: Three counts of robbery, with a finding that he intentionally and personally discharged a firearm during the robberies. (§§ 211, 12022.53, subd. (c).) Three counts of assault with a firearm, with a finding that he personally used a firearm during the assaults. (§§ 245, subd. (a)(2), 12022.5, subd.

(a)(1).) One count of evading an officer with reckless driving. (Veh. Code, § 2800.2, subd. (a).) One count of possession of a firearm by a felon. (§ 12021, subd. (a)(1).) The trial court rendered true findings for allegations of two prior serious felony convictions (§ 667, subd. (a)(1)) and three prior strike convictions. (§ 667, subds. (b)-(i).)

Under the Three Strikes law, the trial court must impose an indeterminate term of life imprisonment for a third-strike defendant, to be served consecutive to any other term for which a consecutive term may be imposed. (§ 667, subds. (e)(2)(A), (B).) The trial court must select the minimum term that must be served for the indeterminate life sentence based on the greater of the following three alternatives: option (i): three times the term otherwise provided as punishment for each current felony; option (ii): 25 years; option (iii): the traditional sentencing term determined pursuant to section 1170 for the current felony including applicable enhancements. (§ 667, subd. (e)(2)(A)(i)-(iii); *People v. Dotson*, *supra*, 16 Cal.4th at pp. 552-553 (*Dotson*); *People v. Thomas* (1997) 56 Cal.App.4th 396, 399-400.)²

Here, the trial court calculated the minimum indeterminate term for the robberies based on option (iii). That is, for each of the robbery counts, the court calculated the minimum term based on the upper term of five years for robbery, plus a 20-year enhancement for the discharge of a firearm under section 12022.53, subdivision (c), plus two five-year enhancements for the two prior serious felony convictions under section

² Subsequent references to "options" are to subparagraphs (i), (ii) and (iii) of section 667, subdivision (e)(2)(A).

667, subdivision (a). Thus, the minimum term for each robbery was 35 years, with the sentences to run concurrently.

Consecutive to the robbery sentence, the court imposed a 25-year minimum indeterminate term for the reckless evasion count (i.e., option (ii)).

In addition to the robbery and evasion indeterminate life sentences, the court imposed a separate determinate term of 20 years for the discharge of a firearm enhancement under section 12022.53, subdivision (c) (hereafter section 12022.53(c)), and a separate determinate term of 10 years for the two prior serious felony convictions under section 667, subdivision (a) (hereafter section 667(a)).

Sentences on the remaining counts and enhancements were stayed per section 654. The total sentence to be served is 90 years to life.

Bruce argues the trial court erroneously imposed a gun discharge enhancement twice—i.e., first, to impose the minimum indeterminate term under option (iii), and second, to impose the separate 20-year determinate term. He contends the court erroneously applied our Supreme Court's holding in *Dotson, supra*, 16 Cal.4th 547 to achieve this result. *Dotson* requires the imposition of a separate determinate term for a prior serious felony conviction enhancement under section 667(a), even when the latter is used to calculate the minimum life term under option (iii). (*Dotson, supra*, at p. 560.) Bruce argues that a gun discharge enhancement is not analogous to a prior serious felony enhancement, and thus the section 12022.53(c) enhancement should have been imposed only one time.

The *Dotson* court premised its analysis on the plain language of the Three Strikes statute. The Three Strikes law requires that an indeterminate life term be imposed "in addition to any other enhancement or punishment provisions which may apply." (§ 667, subd. (e); *Dotson, supra*, 16 Cal.4th at p. 554.) The court concluded: "*This language clearly prescribes that terms of enhancement, including the five-year enhancement under section 667(a), be imposed in addition to the indeterminate term.*" It is difficult to interpret the language of the statute in any other manner.'" (*Dotson, supra*, 16 Cal.4th at p. 554, italics added.) The *Dotson* court also considered the provision in the Three Strikes statute, stating: "The indeterminate term . . . shall be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law," and noted that "any other term of imprisonment" included enhancement terms. (§ 667, subd. (e)(2)(B); *Dotson, supra*, 16 Cal.4th at pp. 555, 560.) The *Dotson* court concluded: "*[T]he three strikes law expressly subjects a defendant to a separate determinate term for enhancements, even when those enhancements are used in calculating the minimum indeterminate life term.*" (*Dotson, supra*, at p. 560, italics added.)

The *Dotson* court rejected the defendant's argument that imposition of a separate determinate term for a prior serious felony enhancement violated section 654's proscription against multiple punishment for the same conduct, as well as the statutory mandate that a section 667(a) enhancement not be imposed if another provision of law provided for greater punishment. (*Dotson, supra*, 16 Cal.4th at pp. 555, 560.) *Dotson* reasoned that imposition of an indeterminate life term under the Three Strikes statute does not constitute imposition of an enhancement; rather, the Three Strikes law

(including option (iii)) merely provides a means of calculating the minimum indeterminate life term for recidivists. (*Dotson, supra*, at pp. 556, 559.) Thus, imposition of the separate determinate term for the enhancement imposed the enhancement only *once*. (*Id.* at p. 560.)

To support his argument that *Dotson's* holding should not apply to a gun discharge enhancement, Bruce points to portions of the *Dotson* decision where the court concluded that addition of a separate term for a prior serious felony conviction is consistent with the voters' intent to ensure longer sentences for recidivists. (*Dotson, supra*, 16 Cal.4th at pp. 556, 558.) Bruce notes that, unlike a prior serious felony enhancement, a gun discharge enhancement does not involve recidivism. Notwithstanding this distinction, it is clear that *Dotson's* holding is premised on a conclusion that imposition of sentence under option (iii) is *not* a sentence enhancement even though the enhancement forms part of the sentence calculation for the minimum indeterminate life term, and that the enhancement is imposed only once via the separate determinate term. Further, the *Dotson* court relied on the plain language of the Three Strikes statute to broadly conclude that "the three strikes law expressly subjects a defendant to a separate determinate term for enhancements, even when those enhancements are used in calculating the minimum indeterminate life term." (*Dotson, supra*, 16 Cal.4th at p. 560.) We see nothing in *Dotson* that expressly or impliedly suggests its holding should be limited to prior serious felony enhancements.

In short, although *Dotson* contains some analysis that is unique to a prior serious felony enhancement, both the plain language of the Three Strikes law and the reasoning in *Dotson* establish that its holding is equally applicable to a gun discharge enhancement.

Bruce also argues that imposition of both an option (iii) term and a separate section 12022.53 term violates the provisions in section 12022.53 providing that only one enhancement may be imposed per crime and that only the greatest punishment provided by law for the conduct shall be imposed. (§ 12022.53, subds. (f), (j).)³ This argument fails because, as we stated, *Dotson* holds that the use of an enhancement to calculate the minimum indeterminate term under the Three Strikes law does not constitute imposition of an enhancement. Thus, inclusion of the section 12022.53 enhancement in the option (iii) calculation did not constitute imposition of a punishment for the gun discharge.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.

³ Section 12022.53, subdivision (f) states: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. . . ."

Section 12022.53, subdivision (j) states: ". . . .When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment."